No. 05-234

In The Supreme Court of the United States

ROBERT WAGNER,

Petitioner,

v.

CITY OF HOLYOKE, MASSACHUSETTS, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION

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OPINIONS BELOW

The Petitioner mistakenly states that the District Court summary judgment opinion was unreported. In fact, the District Court summary judgment decision was published at 241 F. Supp. 2d 78 (D. Mass. 2003), and sets forth a chronology of underlying facts which gave rise to the instant litigation.

STATEMENT OF THE CASE

The Petitioner, incorrectly states that the city officials who imposed discipline testified at trial that each of five particular disciplines were based "exclusively on the conduct specified in the disciplinary notices, and that no discipline would have been imposed but for that conduct." Petition for Writ of Certiorari ("Petition"), at page 3. Despite the Petitioner's myopic view of the record[1] the trial was replete with evidence and testimony that Sgt. Wagner had been disciplined, not for his speech, but for persistent violation of the rules and regulations that he, himself, had put in place; specifically his release of arrest reports and other material protected by Massachusetts law, App. at 22-25; see also App. E. to Petition, 39a-41a; his release of a confidential special internal affairs report concerning another police officer, App. at 26-30; see also App. E to Petition, 42a-44a; his attachment of a twenty-year-old personnel document concerning another officer, as well as

[1] The Petitioner excerpts some 33 questions out of a six-week trial. These constituted the "snippets of testimony" the First Circuit Court of Appeals noted that Wagner pointed to suggest that his discipline was driven by speech itself. See Appendix "A" to Petition for Writ of Certiorari at page 5a.

additional copies of the arrest reports to his Labor Relations complaint in violation of departmental rules, App. at 19-21. The individual defendants testified at length that the Petitioner was disciplined not because of the content of his speech, but because of his failure to follow the chain of command so vital in a paramilitary organization such as a police department, and his failure to report alleged wrongdoing within the chain of command. (App. 1-12).

The Petitioner correctly states that the jury below returned a verdict in favor of the City on that part of Count I alleging retaliatory adverse employment actions, but found for the Petitioner on that part of Count I alleging severe harassment. The jury awarded him $1.00 on that claim. (App. 15).

The jury also returned verdicts in favor of the individual defendants on the Petitioner's common law counts of intentional interference with contractual relations, and intentional infliction of emotional distress. (App. 14).

REASONS FOR DENYING THE PETITION

The decisions below do not conflict with any decision of this Court, or any of the Court of Appeals. The decisions rendered by the First Circuit Court of Appeals are consonant with this Court's decisions in *Pickering v. Board of Education*, 391 U.S. 563 (1968) and *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977) regarding First Amendment claims, and with Supreme Court precedent in cases dealing with qualified immunity.

1. The First Circuit's decision is consistent with the Court's decisions in *Pickering v. Board of Education* and *Mt. Healthy City School District v. Doyle*.

In *Pickering v. Board of Education*, 391 U.S. 563 (1968) this Court established a "balancing test" to accommodate the First Amendment rights of public employees and a public employer's interest in the efficient operation of its business. First, the Court must determine whether the employee's speech addressed a matter of "public concern" as opposed to a matter of purely personal and private interest. If the Court finds, at step one, that the speech involved does involve a matter of "public concern," the Court must then balance the employer's interest in promoting an efficiency of public services and whether the speech involved interfered with official responsibilities. See *Connick v. Myers*, 461 U.S. 138 (1983). These first two factors involve questions of law to be decided by the judge. *Bass v. Richards*, 308 F.3d 1081, 1088 (10th Cir. 2002).

If the Court finds that the balance tipped was towards the employee's First Amendment interests, "the plaintiff/employee must show that the protected expression was a substantial or motivating factor in the adverse employment decision." *O'Connor v. Steeves*, 994 F.2d 905, 911 (1st Cir. 1993), *cert. denied*, *Town of Nahant v. O'Connor*, 510 U.S. 1024 (1993). Finally, if the employee meets that test, "the defendant governmental entity must be afforded an opportunity to show 'by preponderance of the evidence that (it) would have reached the same decision . . . even in the absence of the protected conduct'." *Ibid* (quoting *Mt. Healthy School District v. Doyle*, 429 U.S. 274 [1977]). This is precisely what happened in this trial.

The Petitioner essentially argues that once the Court determines that the employee's speech is protected under steps one and two, the City is foreclosed from either presenting evidence to refute the causation element in step three, or to assert the *Mt. Healthy* defense in step four, arguing: "once that balance is determined to favor the employee, the employer's interests are mooted, and are foreclosed from reexamination via an affirmative defense." Petition for Writ of Certiorari at page 9. That has never been the law and that proposition is directly contrary to *Pickering*, *Mt. Healthy* and its progeny.

The District Court found that Wagner's speech was entitled to First Amendment protection under the first two prongs of the *Pickering* test, which required the Court to assume, as an initial matter, that the speech itself was the motivating cause for the discipline. As the First Circuit's Decision properly recognizes, however, at that point the City was entitled to present evidence that first, Wagner's protected speech was not a "substantial or motivating factor" behind the adverse employment actions, and second, that Wagner would have been disciplined even in the absence of his protected speech. (See Appendix A to Petition, page 5a). This is consistent with *Pickering* and *Mt. Healthy*.

The city presented evidence that the Petitioner was not disciplined for the substance or content of his protected speech, but for violating departmental rules and regulations independent of the speech's content, including the release of arrest reports, internal affairs reports concerning a fellow officer, and twenty-year-old personnel documents. These actions bypassed the department's well-established chain of command and rules which Sgt. Wagner himself had put in place when he served as chief of

police. (Appendix D to Petition, page 34a). The evidence was, of course, disputed and another jury might well have found that the City's proffered reasons were not the true reasons, or independent reasons for his discipline, but as the First Circuit put it "the evidence was by no means conclusive enough to establish causation (under prong three of the *Pickering* test) – let alone preclude a defense under *Mt. Healthy* that Sgt. Wagner would still have been disciplined regardless of his speech for other improprieties incidental to that speech." (First Circuit Decision, Appendix A to Petition at page 5a to 6a).

The Petitioner's tortured interpretation of *Pickering*, *Mt. Healthy*, and its progeny would effectively eliminate the third prong of *Pickering* and the *Mt. Healthy* defense. Neither *Pickering* nor *Mt. Healthy* stand for the proposition that the First Amendment inoculates governmental employees from legitimate discipline, imposed independent of speech. Yet, that is precisely how the Petitioner views the holdings in those cases.

The Petitioner's contention that the First Circuit "ruled that the defendant did not have to prove that it would have disciplined Sgt. Wagner even if he had not engaged in (protected conduct) is simply wrong." Petition at page 11. The First Circuit, consonant with the precepts of *Pickering* and *Mt. Healthy* correctly allocated the burdens each party had to bear in the *Pickering* analysis and properly held that, where the evidence, as it was here, was disputed, it was for the jury to decide issues of causation or whether the City had demonstrated that it would have disciplined Sgt. Wagner regardless of the content of his speech. This jury decided that the City had met its burden and found that no adverse employment action had been taken against Wagner in violation of his First

Amendment rights. The Petitioner may be understandably upset with the final result, but there is no merit to his contention that the First Circuit's decision in this case conflicts with any Supreme Court precedent.

2. The First Circuit's decision does not conflict with decisions from the Sixth and Seventh Courts of Appeal.

The Petitioner next contends that the First Circuit's decision conflicts with the decisions of the Courts of Appeal for the Sixth and Seventh Circuit which, he claims, hold that disciplinary regulations cannot be applied to constitutionally protected conduct. An examination of the cases, however, demonstrates that the Petitioner has misconstrued the holdings of those cases, and that they do not conflict with the First Circuit's decision here.

The Petitioner relies heavily on the Seventh Circuit's decision in *Hanneman v. Breier*, 528 F.2d 750 (7th Cir. 1976). In *Hanneman*, police officers were disciplined by the chief of police for distributing a letter which contained statements which the Court found were not knowingly or recklessly false, and which confirmed the existence of an already publicized internal police investigation. The Seventh Circuit Court of Appeals, while recognizing the validity of departmental regulations which precluded the disclosure of confidential information, nevertheless found the chief's discipline to be wrongful in that case because that by the time the letter was distributed, the internal investigation had already been published in a local newspaper and was no longer secret. The Court found that "under these circumstances" (i.e., that fact that the internal investigation had already been publicized) it did not believe that the State's interest in applying the department's

confidentiality rule justified its application in that case. *Ibid* at 754. "Once the matter had been placed *in the public eye*, plaintiffs, . . . had a legitimate interest in bringing any improper antiunion conduct by the chief of police in connection with a *now publicized investigation* to the attention of influential government officials outside the police department." (emphasis added) *Ibid* at 755. It is fair to suggest that, had the investigation not already been publicized, the Court may have reached a different result. In any event, the case does *not* stand for the principle that disciplinary regulations can never be applied to protected conduct, regardless of the instrumentalities used to convey the message.

By contrast Sgt. Wagner's disclosure of an ongoing criminal investigation, private personnel documents and other materials had not been made public prior to his disclosure of the documents. His disclosure of these documents to a local newspaper revealed the existence of an ongoing criminal investigation which, at that point, had been secret. Under these circumstances, the police department was justified in disciplining Wagner, not for his speech, but for his violation of departmental confidentiality rules, and the departmental chain of command. Nothing in *Hanneman* suggests otherwise.

Similarly, the Petitioner's reliance on *Solomon v. Royal Oak Township*, 842 F.2d 862 (6th Cir. 1998) is misplaced. In that case, the Sixth Circuit specifically found that the plaintiff had not violated any of the departmental rules and therefore the rules themselves played little role in the Court's determination as to whether or not Solomon's speech constituted a matter of public concern. More importantly, the defendants in that case presented no evidence on either *Pickering's* third

prong or the *Mt. Healthy* defense. *Ibid* at 867. Thus, the Court upheld a verdict which found the defendants responsible for a First Amendment violation.

In short, none of the cases relied upon by the Petitioner are in any way contrary to the First Circuit's decision in this case.

3. This case does not present an appropriate opportunity for the Court to decide an unresolved question as to the proper standard for the determination of qualified immunity in cases alleging First Amendment retaliation.

I.

The Petitioner contends that this Court, in *Crawford-El v. Britton*, 523 U.S. 574 (1998), left unresolved the question of "whether an evaluation of qualified immunity in a case involving alleged First Amendment retaliation must consider the reasonableness of a defendant's action in terms of his intent or motivation." Petition, 16. Then the Petitioner, relying on *Crawford-El*, 523 U.S. at 588-589, answers the unresolved question: "However, where that same official in that same situation takes the same action because of another's protected conduct, he would not have qualified immunity since any reasonable official would know he cannot retaliate for protected conduct." *Ibid*

The Petitioner confuses proof of the elements of the constitutional tort with proof that "a reasonable official would understand what he is doing violates that right." Petition, 17. As the majority states in *Crawford-El*, at 589, "Thus, although evidence of improper motive is irrelevant on the issue of qualified immunity, it may be an essential component of the plaintiff's affirmative case. *Compare*,